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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted August 20, 2002*
Decided August 20, 2002

Before
Hon. William J. Bauer, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Terrence T. Evans, Circuit Judge

No. 02-1140

GILDA A. KLEIN, *Plaintiff-Appellant*,	) Appeal from the United) States District Court for) the Northern District of) Illinois, Eastern Division
v.	)
	) No. 01 C 2357
JOHN E. POTTER, et al., *Defendants-Appellees.*	) **Robert W. Gettleman,**) Judge.

ORDER

Postal worker Gilda A. Klein participated in a protest during which she carried a sign and made statements

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record.

criticizing her employer. In response Klein's supervisors temporarily removed her from her position, but after her reinstatement, Klein declined to return to her job and instead filed suit in district court, seeking damages. The district court dismissed, and Klein appeals. We affirm.

In March 1998 Klein was working as a window clerk at the Auburn Park Station in Chicago. She was a 28-year veteran of the United States Postal Service and at the time served as a Vice President of the National Alliance of Postal and Federal Employees. That month during a protest outside the Auburn Park Station Klein carried a sign that read "Long Lines, Late Delivery, Don't Believe the Hype." And used a bullhorn to criticize the Postal Service and Chicago Postmaster Rufus Porter. Shortly thereafter, the Postal Service placed Klein on administrative leave. In compliance with the collective bargaining agreement between the Postal Service and the American Postal Workers Union ("APWU"), Klein filed a grievance requesting that she be returned to full duty. The Postal Service and the APWU were unable to resolve the dispute, and Klein received a Notice of Removal.

Klein filed a second grievance, and this time the Postal Service and the APWU reached a settlement. The Postal Service expunged the Notice of Removal from Klein's record, returned her to full duty status, and gave her back pay.

But the stress of her dispute with the Postal Service had aggravated Klein's pre-existing disorder, and as a result she did not return to work. Instead Klein filed a worker's compensation claim with the United States Department of Labor and was awarded benefits. Klein never returned to her job.

Klein then sued the Postmaster General, the Chicago Postmaster, and two supervisors at the Auburn Park Station, alleging violations of her First Amendment rights

and the intentional infliction of emotional distress. The defendants moved to dismiss for lack of subject matter jurisdiction, arguing that Klein's claims were pre-empted by the Postal Reorganization Act and the Federal Employees Compensation Act. The district court dismissed.

Individuals may sue federal officials for damages based on violations of the Constitution, *see Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), unless a comprehensive administrative scheme already affords a meaningful remedy, *see Bush v. Lucas,* 462 U.S. 367 (1983); *Bogola v. Kindt,* 131 F. 3d 632, 640-642 (7th Cir. 1997). This is so even if the remedies available under the administrative scheme do not provide complete relief for the plaintiff. *Bogola,* 131 F.3d at 640-41; *Robbins v. Bentsen,* 41 F.3d 1195, 1201 (7th Cir. 1994). Thus we have held that federal employees covered under the Civil Service Reform Act ('CSRA') may not pursue a *Bivens* suit based on an adverse personnel decision *Robbins, 41 F.3d at 1202,* and Postal Service employees enjoy the substantive and procedural safeguards of the CSRA as modified by the collective bargaining agreement negotiated on their behalf, 39 U.S.C. 1005 (a)(1). A detailed four-step grievance process is available to postal workers who wish to challenge employment actions; Klein took advantage of and obtained relief through this grievance process. The Postal Service's grievance process is exactly the kind of comprehensive administrative scheme that bars a *Bivens* action. *Roman v. United States Postal Serv.,* 821 F .2d 382, 386 (7th Cir. 1987); *Ellis v. United States Postal Serv., 784* F.2d 835, 839-40 (7th Cir. 1986).

Klein First Amendment claim therefore was properly dismissed. We note, however that lack of subject matter jurisdiction was an improper ground for dismissal. Federal courts have jurisdiction over all cases that, like Klein's arise under the Constitution. 28 U.S.C. 1331. The issue

here is not the district court's power to hear Klein's First Amendment claim, but rather its authority to grant relief. As we have noted, the Postal Service's comprehensive grievance process precludes relief under *Bivens*, see *Roman, 821 F.2d at 386; Ellis,* 784 F.2d at 839-40, and therefore the appropriate basis for dismissing Klein's constitutional claim was failure to state a claim upon which relief can be granted, not lac of subject matter jurisdiction. *Massey v. Helman,* 196 F.3d 727, 737-38 (7th Cir. 1999). On that basis we affirm the dismissal. *Id.*

In addition to her constitutional claim, Klein raised a claim under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 2671 *et seq.*, alleging that her supervisors intentionally inflicted emotional distress. But Klein did not exhaust her administrative remedies before filing suit as required by the FTCA, see *28 U.S.C. 2675(a)* and the district court therefore lacked jurisdiction over the claim, see *Frey v. EPA, 270 F .3d 1129, 1135 (7th Cir. 2001)*

Klein raised a third claim that the district court did not address in its dismissal order; that her supervisors discriminated against her on the basis of race and sex in violation of title VII of the Civil rights Act of 1964, 42 U.S.C. ss 2000e *et seq*. But Klein never presented her allegations to the EEOC and therefore has not exhausted her administrative remedies as required before filing suit. *42 U.S.C. § 2000e-16; see Gordon v. United Airlines, 246 F.3d 878, 883 n.3 (7th Cir. 2001).*

AFFIRMED

APPENDIX B

Case Number: 01 C 2357 Date: November 29, 2001

Name of the Assigned Judge: Robert W. Gettleman

Case Title: Gilda Klein V. John E. Potter, et al.,

* * * *

DOCKET ENTRY:

(10) ☒ {other docket entry]
Defendant's metion to dismiss for lack of jurisdiction is granted.

(11) ☒ [For Further detail see order on the reverse side of the original minute order.]

[Reverse Side]

ORDER

Plaintiff Gilda Klein was fired from her job at the Auburn Park post office for participating in a protest directed at defendant, Chicago Postmaster Rufus Porter. She grieved her discharge (arguing First Amendment rights) and ultimately won a settlement pursuant to which she was reinstated with full back pay and all disciplinary actions expunged from her records. Rather than return to work, plaintiff filed a claim with the United States Department of Labor, Office of Workers compensation, seeking benefits for an alleged aggravation of anxiety disorder resulting from her improper discharge and the grievance procedure. Her claim was accepted and plaintiff was awarded benefits. Plaintiff then filed the instant two count pro se action against Porter, John Potter, Postmaster General, and two of plaintiff's supervisors at Auburn Park,

Paula McHenry and Annette Frazier, alleging a violation of her First Amendment rights to free speech and infliction of emotional distress. Defendants' have moved to dismiss for lack of subject matter jurisdiction.

Count I, which the court construes to be brought pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), is dismissed. The administrative review mechanism created by Congress and pursued with success by plaintiff provides a meaningful remedy and thus foreclosed the implication of a judicially crafted cause of action under *Bivens. Correctional Services Corp . Maleski, S.*Ct.__, 2001, WL. 1488029 (Nov. 27, 2001), *Bush v. Lucas*, 462 U.S. 367, 390 (1983); *Alice v. U.S. Postal Service*, 784 F .2d 835, 839-40 (7th Cir. 1986).

Absent Court I, the court lacks subject matter jurisdiction over Court II which appears to be a claim for infliction of emotional distress arising from Postmaster Porter's and other supervisors' conduct. Any such tort claim would have to proceed against the United States pursuant to the Federal torts Claim Act, 39 U.S.C. 409, but is precluded by the Postal Reorganization Act, 39 U.S.C. § 1001 et seq., and the Civil Service Reform Act, 5 U.S.C. § 7501 et seq., *See Kennedy v. United States Postal Service* 145 F.3d 1077 (9th Cir. 1998).

Accordingly, for the reasons set forth above, defendant's motion to dismiss for lack of jurisdiction is granted.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 3, 2002
Decided April 14, 2003

Before
Hon. William J. Bauer, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Terrence T. Evans, Circuit Judge

No. 02-1140

GILDA A. KLEIN, *Plaintiff-Appellant*,	) Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
v.	) No. 01 C 2357
JOHN E. POTTER, et al., *Defendants-Appellees.*	) **Robert W. Gettleman**, Judge.

ORDER

On September 3, 2002, the plaintiff-appellant filed a petition for rehearing. All the judges on the original panel have voted to deny the petition, and it is therefore DENIED.

APPENDIX D

FORM 2A- NON VETERAN PREFERENCE

DATE: March 27, 1998

SUBJECT: NOTICE OF REMOVAL

TO; Gilda Klein — 335-46-7021
Employee's Name — Soc. Sec. No

Window Clerk, Full-Time — 020
Job Title — Pay Loc.

You are hereby given not less than 30 days advance written notice of your removal from the Postal Service. The reason for this action is:

CHARGE: UNACCEPTABLE CONDUCT

On March 6, 1998, at approximately 4:00 P.M., you were observed participating in a protest demonstration outside the Auburn Park Post Office. You were observed marching with other people and carrying a picket sign that read "Long Lines, Late Delivery. Don't believe the hype." You were also using a Bullhorn loud speaker to say "Porter must go."

Your actions were a deliberate attempt to bring notoriety, and adversely affect the reputation of the Postal Service and undermine the publics confidence in the ability of the Postal Service to accomplish its mission.

When interviewed about your actions, you refused to make any comment.

You violated section 661.53 of the ELM with states, "No employee will engage in criminal, dishonest, notoriously disgraceful or immoral conduct, or other conduct prejudicial to the Postal Service. Section 666.2 of the ELM states "Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal service."

Further, the unsubstantiated allegations of "Long lines and Delayed Mail" were an attempt to tarnish the Postal Service's image.

The following elements of your past disciplinary record have been considered in taking this action:

14 Day Suspension—January 29, 1998—AWOL

7 Day Suspension—July 29, 1997—Unacceptable Conduct

You have the right to file a grievance under the Grievance-Arbitration procedure set forth in Article 15, Section 2 of the National Agreement within 14 days of your receipt of this notice.

"If this action is overturned on appeal, back pay will be allowed, unless otherwise specified in the appropriate award or decision. ONLY IF YOU HAVE MADE REASONABLE EFFORTS TO OBTAIN OTHER EMPLOYMENT DURING THE RELEVANT NON-WORK PERIOD. The extent of documentation necessary to support your back pay claim is explained in the Employee and Labor Relations Manual, Section 436." (COPY ATTACHED)

/s/Annette W. Fraizer	/s/ P. McHenry
Signature of Supervisor	Approved by Installation Head or Designee

/s/ Annette W. Frazier
Name of Supervisor (Printed)

Received by Employee_____

Date: 03/31/98 Time_____

Mailed certified & reg. mail

APPENDIX E

LABOR RELATIONS
CHICAGO DISTRICT

UNITED STATES POSTAL SERVICE

J94C-4J-D 98073261 Dist 606
04/16/98 722M78
KLEIN G
CHICAGO IL 6060-9511

July 29, 1998

John Clark
APWU National Business Agent
330 S. Wells #810
Chicago, Il 60606

SUBJECT: STEP 3 SETTLEMENT DECISION

Case Number: J94C-4J-D98073261
Grievant: Gilda Klein PL 020
Article Code: 16.7000, 65.0200

Pursuant to the terms and obligations as set forth in Article 15 of the National Agreement, management and union designee met at Step 3 of the grievance procedure. The results of the meeting on the above referenced case are as follows:

As a final and complete settlement of the subject grievance, the following resolution has been arrived at between the parties:

Solely in an effort to settle this grievance, the Notice of Emergency Placement dated July 31, 1997 is hereby rescinded. The grievant will be paid at the straight-time rate for time lost due to the emergency placement.
(Dates of emergency placement included August 1, 4,5, 6,7,8. 1997.)

/s/Cindy M. Wheeler — 7-29-98
Step 3 Management Designee — Date

/s/ John Clark — 7-31-98
Step 3 Union Designee — Date

APPENDIX F

UNITED STATES
POSTAL SERVICE

August 14, 1998

John Clark
APWU Business Agent
330 S. Wells Street Suite 810
Chicago, Il 60606

SUBJECT: STEP 3 SETTLEMENT DECISIONS

Case Numbers:	J94C-4J-D 98102699
	J94C-4J-D 98102702
	J94D-4J-D 98073261
Grievant:	Gilda Klein PL 020
	16.3000, 16.4000, 16.500

Pursuant to the terms and obligations as set forth in Article 15 of the National Agreement, management and union designee met at Step 3 of the grievance procedure. The results of the meeting on the above referenced case are as follows:

As a final and complete settlement of the subject grievances, the following resolution has been arrived at between the parties:

The Notice of Removal dated March 27, 1998 is hereby expunged from the grievant's record. She will be paid lost straight-time work hours from March 31, 1998 to August 19, 1998. She will return to duty on August 20, 1998.

The 14 Day Suspension dated January 29, 1998 issued to the grievant for AWOL is hereby expunged from her record. She will be paid for one week of the suspension for lost straight time work hours.

The 7 Day Suspension issued to the grievant dated August 14, 1997 for unacceptable conduct will be expunged from her record with no back pay on August 14, 1999 provided she is issued no further discipline

/s/ Cindy M. Wheeler	8-14-98
Step 3 Management Designee	Date
/s/ John Clark	8-14-98
Step 3 Union Designee	Date

APPENDIX G

Ms. Gilda Klein Holding a Picket Sign and Marching in Front of Auburn Park Post Office. The Sign that She was Carrying Stated Long Lines, Late Delivery, and Don't believe the Hype. I also observed Mr. Earl Hicks along with his (Minor) Son Marching and Carrying a Sign. I Can't Recall what his sign Stated. Mr. McClintonnel was also Marching in the Picket Line but I can't Recall whether or not he was carrying a Sign but He did Participate in the Picket against Management and Auburn Park Post Office and the Postal Service.

/s/ Annette Frazier

3/20/98

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GILDA A. KLEIN	)	
Plaintiff,	)	No. O1 C 2357
	)	
v.	)	Filed September 18, 2001
	)	
WILLIAM J HENDERSON	)	
POSTMASTER GENERAL	)	JUDGE GETTLEMAN
Defendant.	)	

AMENDED COMPLAINT

[Full Text Not Included]

APPENDIX I

AO 450(Rev. 5/85)Judgment in a Civil Case

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Gilda Klein

v. Case Number 01 C 2357

JOHN E. POTTER

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDRED AND ADJUDGED that defendant's motion to dismiss for lack of jurisdiction is granted.

Michael W. Dobbins, Clerk of Court

Date: Nov. 29, 2001 /s/ George D. Shwemin
George D. Schwemin, Deputy Clerk

APPENDIX J

File Number 100483092
6030b2b-0-P

U.S. DEPARTMENT OF LABOR

DEPARTMENT STANDARDS ADMINISTRATION OFFICE OF WORKERS COMPENSATION
230 S. DEARBORN, 8th FLOOR
CHICAGO, IL 60604
Phone (312) 596-7157

January 3, 2001

Date of Injury: 03/10/1998
Employee: Gilda Klein

Gilda Klein:
10325 S. Peoria
Chicago, IL 60643

Dear Ms. Klein:

I am writing in reference to the above cited case, which has been accepted for an aggravation of anxiety disorder.

PAYMENT OF COMPENSATION. Compensation is being paid from August 20, 1998 to August 23, 1999. As discussed in our telephone conversation of yesterday afternoon, the evidence of file indicates that you were paid by your employing agency through August 19, 1998. In addition, we cannot yet pay you for compensation after August 23, 1999, because you had earnings in the private sector. We are awaiting information from the Social Security Administration regarding your earnings before we can pay you the difference for the time during which you worked.

The pay-rate for compensation purposes is the one on the date you last performed work for the U.S. Postal Service (which is also the date of injury). March 10, 1998. On that date your annual pay-rate was $37,456 which is $720.30 weekly. You are being paid at a compensation rate of 75% because you have at least one dependent. We deducted for your health benefit plain (code 105) and your optional life insurance (code X) for the following dates: 8/22/98-8/13/99. Your gross payment (after the comp rate was factored in) for the period above was $28477.84 and the check amount was $26,790.67 after health benefit and life insurance premiums were deducted.

If you wish to claim further compensation, submit Form CA-7 every two weeks. The OWCP may obtain further reports from your attending physician, refer you to a second opinion specialist, or both.

RETURN TO WORK. Full compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition. Unless your agency has told you otherwise, you re still its employee and subject to its personnel rules. You are expected to return to work (including light duty or part-time work, if available) as soon as you are no longer totally disabled because of your accepted employment related condition.

If you have not done so, ask your employing agency:

1. Whether light or limited duty work is available for partially disabled employees
2. Whether your usual job can be changed to meet your work limitations due to the accepted condition(s).

If the answer to either of these questions is yes:

1. Ask your agency to send a copy of the job description to you and to your attending physician. The job description should include the physical duties of the job.
2. Ask your physician whether and when you will be able to perform these duties. Once you can perform light or limited duty, you should report to your agency seeking such duty.

If you have any questions, please contact me at the address noted above.

Sincerely,

/s/ Julia A. Tritz
Julia A. Tritz
Senior Claims Examiner
US POSTAL SERVICE
CHICAGO POST OFFICE
INJURY COMP SPECIALIST
433 W. HARRISON 4M 4065
CHICAGO, IL 60607

APPENDIX K

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment of the Constitution of the United States which provides as follows:

> "Freedom of Religion, Speech and Press; Right of Assembly and Petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

This case involves Title VII, 42 U.S.D. 2000e *et seq.*, prohibits discrimination in hiring, promotion, termination, compensation and other terms and conditions of employment because of race, color, sex (including pregnancy), national origin or religion.